K.T.S. SDN. BHD.

v.

FOONG SENG FUAT SAWMILL SDN. BHD. & ANOR.

HIGH COURT MALAYA, IPOH
PEH SWEE CHIN J
[CIVIL SUIT NO. 1543 OF 1985]
27 DECEMBER 1986

CONTRACT: *Agency - Whether agent who signs a contract, citing his own name, personally liable.*

EVIDENCE: *Evidence Act 1950 - Section 92 - Admissibility - Oral evidence to show the capacity in which agent signed the above contract.*

This is an appeal by the 1st defendant against the decision of the Senior Assistant Registrar granting the plaintiff leave to enter summary judgment for part of the sum claimed on an O. 14 application.

The plaintiff had entered into 11 contracts with the 1st defendant for the sale and supply of sawn timber to the plaintiff. The 1st defendant admitted signing only 6 of the contracts but denied signing the rest and further denied any liability at all for the 6 contracts signed by it. Affidavit evidence showed that the contracts were all negotiated and concluded between the 2nd defendant and the plaintiff with the Ist defendant and its directors taking no part at all. The plaintiff was aware that the 1st defendant's sawmill was operated by the 2nd defendant and that the contracts were executed by the 1st defendant to comply with s. 13 of the Malaysian Industry Board (Incorporation) Act 1973 because the 1st defendant, and not the 2nd defendant, alone had the licence to sell or supply sawn timber. The plaintiff had admitted that the sum claimed in the suit was in fact paid to the 2nd defendant and not the 1st defendant. The plaintiff knew that the Ist defendant was acting *qua* agent for the 2nd defendant.

Held:

[1] When a person signs a contract which cites his own name as party thereto without any qualification contained anywhere in the contract indicative of his acting as an agent for any third person or principal, then *he must* be presumed to have contracted personally, and to be liable personally. This must be so even if the other party to the contract was aware that he was signing the contract for the third person or principal. The 1st defendant therefore cannot escape liability on the 6 contracts for which he must accept responsibility. Consequently there was no substantial question to be tried.

[2] Whether oral evidence is excluded by s. 92 of the Evidence Act 1950 to prove that a party acted as an agent for a third party or principal depends on the purpose for which such evidence is adduced. If the purpose is to show merely that he has acted as an agent on the contract for some principal so as to charge the said principal with liability therefor, or to give the benefit of the contract to such principal, then oral evidence is admissible for he remains liable personally on the contract and is not attempting to contradict or vary any term of the contract but is merely saying that it also binding on the principal. If the purpose, on the other hand, is to prove that although he appears on the contract to have contracted personally but that he had not in fact contracted personally but has acted as agent for a third party or principal, then such evidence is inadmissible as he attempts to contradict the terms of the contract.

[Appeal dismissed with costs.]

Cases referred to:
Higgins v. Senior [1841] 8 M & 834
Basma v. Weekes [1950] AC 44

Legislation referred to:
Contracts Act 1950, s. 233
Evidence Act 1950, s. 92
Malaysian Timber Industry Board (Incorporation) Act 1973, s. 13
Rules of the High Court 1980, O. 14

Other sources referred to:
Indian Contract and Specific Relief Acts, Pollock & Mulla, 1st Edn.

For the plaintiff - Ahmad Moosdeen; M/s. Chan, Moosdeen & Partners
For the Ist defendant - Choo Chin Heun; M/s. Jeffrey Tan & Co.

JUDGMENT

Peh Swee Chin J:

This case has raised some very interesting questions from the law of principal and agent but its true scope has somewhat not been always fully revealed in the cases in which it has arisen.

I have earlier dismissed an appeal against the decision of the learned Senior Assistant Registrar granting leave to enter judgment for part of the sum claimed on an O. 14 application. I now give my grounds. First, it will be necessary to set out the relevant facts.

The plaintiff alleged that they had entered into 11 contracts with the 1st defendant for the sale and supply of sawn timber to the plaintiff for the total price of RM559,437.40, the particulars of the 11 contracts and their respective prices being set out in the statement of claim.

The 1st defendant admitted signing only 6 of them but denied signing the rest and further denied any liability at all for the 6 contracts signed by it, on some grounds to be further dealt with by me. The learned Senior Assistant Registrar granted leave to enter judgment for the total of the prices of the said 6 contracts and further granted leave to defend to the 1st defendant as regards the rest of the 11 contracts.

One Leong Kam Cheow by affidavit dated 1 March 1980, on behalf of the 1st defendant, deposed further to the effect as follows. The said contracts were all negotiated and concluded between 2nd defendant and the plaintiff with 1st defendant and its directors taking no part at all. The plaintiff was aware of the fact that the sawmill of the first defendant was in fact operated by the second defendant and that those contracts executed by 1st defendant were so executed to comply with s. 13 of the Malaysian Timber Industry Board (Incorporation) Act 1973 because the Ist defendant, and not the 2nd defendant, alone had the licence to sell or supply sawn timber. The said Act is an Act for regulating timber trade. The deponent further referred to the invoices exhibited by the plaintiff to the affidavit sworn to connection, plaintiff had admitted that the sum claimed in this suit was in fact paid to 2nd defendant and not the 1st defendant. All the allegations were never contradicted by any counter affidavit, and some of which were in fact, raised first by the plaintiff itself.

Before me, learned counsel for the 1st defendant reiterated the substance of her client's affidavit as set out above.

Learned Counsel for the plaintiff referred to s. 92 of the Evidence Act, and submitted that no evidence could be admitted to vary the liability of the 1st defendant.

In my view, it is settled that when a person signs a contract which cites his own name as a party thereto without any qualification contained anywhere in the said contract, indicative of such contract being entered into by him as an agent for any third person or principal, then he must be presumed to have contracted **personally**; and to be liable personally therefor, this must be so even it is in fact known to the other party to the contract at the time of signing the said contract that such person who so signs, is signing the said contract for the 3rd person or the principal. In my view; further, if there is any of such qualifications aforesaid, it would fall to be considered as to whether it is sufficient for a party cited in a contract to escape personal liability thereon.

The leading case is *Higgins v. Senior* [1841] 8 M & W 834. In that case, the defendant there appeared to have signed a contract for sale of goods. There was no qualification of the nature as described above in the said contract. When sued, the defendant then sought to escape liability by proving that he signed the contact as an agent for a 3rd person and this was known at that time to the plaintiff. It was held that the defendant could not avoid personal liability. This case was cited with approval and applied by the Privy Council in the case of *Basma v. Weekes* [1950] AC 44, in which the plaintiff, to give his full name, Abdul Karim Basma, sued 3 persons viz. Weekes and 2 Others of the other part. Oral evidence had sufficiently proved to the satisfaction of the Court that the said Rogers Wright was acting as an agent for Basma, the plaintiff.

Inter alia, it was raised as a defence in this Privy Council case that the contract was one between Rogers Wright and the 3 defendants, and not between the 3 defendants and Basma the plaintiff. Lord Reid held after reviewing a number of cases, that Rogers Wright in the circumstances could have sued on the contract himself and if he could sue, so could his principal, the plaintiff.

The case of *Higgins v. Senior* (*supra*) is also very important for throwing light on the question of admissibility of oral evidence by a defendant (sued on a contract), to prove that he has acted as agent for a person not a party to a contract or for a principal, as such evidence appears to be excluded as a rule by s. 92 of the Evidence Act. The *ratio* of this reported case is that the admissibility or otherwise of such oral evidence to prove such agency for a 3rd person depends on the purpose for which such evidence is adduced.

If the purpose is to show merely that he has acted an agent on the contract for some principal so as to charge the said principal with liability therefore, or to give the benefit of the contract to such principal, then oral evidence by the defendant who is the party to the contract that he has acted as agent for the principal is admissible for he remains liable personally on the contract and he is not attempting to vary or contradict any term of the contract but is merely saying that it is also binding on the principal.

If the purpose, on the other hand, is to prove that although he appears on the contract to have contracted personally but that he has not in fact contracted personally but has acted as agent for a 3rd person or principal, then such evidence is inadmissible as he attempts to contradict the terms of the contract.

The relevant passage in Parke B's judgment in the case of *Higgins v. Senior* is at p. 844 and reads as follows:

> There is no doubt, that where such an agreement is made, it is competent to show that one or both of the contracting parties were agents for other persons, and acted as such agents in making the contract, so as to give the benefit of the contract on the one hand to, and charge with liability on the other, the unnamed principals: and this, whether the agreement be or be

> not required to be in writing by the Statute of Frauds: and this evidence in no way contradicts the written agreement. It does not deny that it is binding on those whom, on the face of it, it purports to bind; but shows that it also binds another, by reason that the act of the agent, in signing the agreement, in pursuance of his authority, is in law the act of principal. But, on the other hand, to allow evidence to be given that the party who appears on the face of the instrument to be personally a contracting party, is not such, would be to allow parol evidence to contradict the written agreement; which cannot be done.

The quoted passage also reinforces the principle relating to the effect of a man signing a contract in his name without any qualification etc., I have mentioned earlier.

If it should be doubted that the quoted passage may not represent a position covered by s. 92 of the Evidence Act, then it is to be borne in mind that Parke B used the vital expression, "to vary the written agreement", similar expression used in our s. 92, and after all, it is to be remembered that the co-author of "Pollack & Mulla on *Indian Contract and Specific Relief Acts*", in the preface to its first edition, wrote the first sentence as follows:

> The Indian Contract Act is in effect and for the reasons explained in our commentary on the first edition, a code of English law,

It is to be remembered our Contracts Act itself was taken almost lock, stock and barrel from the Indian Contract Act.

In this connection, the Privy Council case of *Basma, supra*, seems to have been decided not only on the *ratio* of the case of *Higgins v. Senior*, but also practically on the converse basis of our s. 233 of the Contracts Act which reads: "In cases where the agent is personally liable, a person dealing with him may hold either him or his principal, or both of them, liable. I mentioned the converse basis because Lord Reid said if Wright could have sued personally, so could Wright's principal (Basma), the plaintiff there, and also to show the underlying fabric of our Contracts Act.

Bearing in mind what has been said about the principle described above, it would apply squarely to the facts of the instant case. No qualification of the nature described by me earlier, appeared in the six contracts which the first defendant admitted having signed as a party thereto. It was common ground, or not disputed by both the parties that the plaintiff knew that the 1st defendant was acting *qua* agent for the 2nd defendant; but in my judgment the 1st defendant could not escape liability on the six contracts the 2nd defendant; but in my judgment the 1st defendant could not escape liability on the six contracts for he must accept responsibility on account of the principle explained by me above. There was consequently no substantial question to be tried and it would be quite unreasonable for the 1st defendant to subject the plaintiff to incurring more costs in having to establish liability on the said six contracts.

I therefore upheld the decision of the learned Senior Assistant Registrar and dismissed with costs of the appeal of the Ist defendant.

Also found at [1987] 1 CLJ 596